(1)

Supreme Court, U.S.
FILED

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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

JEFF GREENE,

Petitioner

v.

IMAGINE ENTERTAINMENT, HOWARD PRODUCTIONS, INC., and GRAZER PRODUCTIONS, INC.

Respondents.

On Petition for Writ of Certiorari
To The Superior Court of the State
of California for the County of Los Angeles

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTION PRESENTED FOR REVIEW

Introductory Statement

Petitioner Jeff Greene seeks review of a punitive damages award that was entered against him after a jury trial.

The jury was given seven separate special verdict forms for each of the claims being prosecuted against Mr. Greene. Six of the verdicts were related to the causes of action set forth in Respondent's pleading; the seventh verdict form was based upon a new tort theory advanced by Respondent for the first time at trial.

The jury awarded specific amounts of compensatory damages in favor of Respondent Imagine Entertainment ("Imagine") and against Mr. Greene on five of the verdict forms, three of which were based upon contract claims and two of which were based upon alleged torts. The jury only found that punitive damages were appropriate with respect to the tort claim that was never pled against Mr. Greene.

The total amount of compensatory damages awarded by the jury were $104,016, most of which related to claims founded upon contract law. Of this amount, only $2,034 was the compensatory damages award for the tort claim where the jury determined that punitive damages were appropriate. Nonetheless, motivated by passion and prejudiced, the jury awarded $500,000 of punitive damages.

Question for Review

Was it a violation of Mr. Greene's due process rights guaranteed by the Fourteenth Amendment to the Constitution, to be subject to a $500,000 award of punitive damages based upon a claim that was not set forth in Imagine's pleadings and where the compensatory award by the jury was only $2,034?

PARTIES TO THE UNDERLYING PROCEEDING

Petitioner Jeff Greene ("Mr. Greene") was the Plaintiff and Cross-Defendant in the underlying action.

Respondent Imagine Entertainment ("Imagine") is a general partnership and was a Defendant and the Cross-Complainant.

Respondents Howard Productions, Inc. and Grazer Productions, Inc. are the general partners of Imagine. Since they would have had liability for the debt as a matter of law, they were also named as defendants in the underlying action. Neither Howard Productions, Inc. nor Grazer Productions, Inc. were parties to Imagine's Cross-Complaint.

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CITATIONS TO OPINIONS AND ORDERS

Judgment on Special Verdict entered April 19, 1999 by the Superior Court of the State of California for the County of Los Angeles in Greene v. Imagine Entertainment, Case Number BC 189133 (included in the Appendix hereto at pages 23-30).

Opinion (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three entered on April 26, 2001, in Greene v. Imagine Entertainment, Case Number B133119 (included in the Appendix hereto at pages 31-61).

Order (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three dated May 15, 2001, on Petition of Jeff Greene for rehearing of appeal in Greene v. Imagine Entertainment, Case Number B133119 (included in the Appendix hereto at page 62).

Order of the Supreme Court of California entered on July 11, 2001, on Petition for Review of Jeff Greene in Greene v. Imagine Entertainment, Case Number S098068 (included in the Appendix hereto at page 63).

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner Jeff Greene respectfully petitions this Court for a Writ of Certiorari following the denial of a Petition for Review entered July 11, 2001 by the California Supreme Court of a decision of the California Court of Appeal, Second Appellate District, Division Three, filed April 25, 2001, that affirmed the judgment after trial in the Los Angeles Superior Court.

INTRODUCTION

Despite no showing that Petitioner/Cross-Defendant Jeff Greene caused anyone physical injury, loss or even significant inconvenience, he is subject to a $500,000 punitive judgment in this action based upon an unpled fraudulent concealment claim where the compensatory damages were only $2,034. All Mr. Greene did was rent his house to a famous celebrity, Ron Howard, and his family, who became ruffled by totally unexpected water infiltration problems during the severe El Niño storms in the winter of 1998. Even though the water problem was never so serious that the Howards were forced to spend a single night in a hotel, without warning, they had their housekeeper pack up their belongings and move. The star-struck jury agreed that the Howards were justified in moving out of the house and gave their company, Respondent/Cross-Complainant Imagine Entertainment, compensation for lack of habitability, constructive eviction, breach of contract, and failing to return the security deposit totaling over $100,000. An additional $2,034 was awarded on the unpled concealment claim which was the sole claim where the jury determined that punitive damages were appropriate. (After trial, Mr. Greene was further assessed another $300,000 for Imagine's attorney's fees and costs.)

Clearly the punitive award of $500,000 was based upon passion and prejudice and the product of errors of law, in liberties taken by both the trial and appellate courts in construing the jury's verdict, and has resulted in a violation of Mr. Greene's due process rights. Respondent and the courts have taken the position that they can second guess the jury's intent despite a clear and unambiguous form of special verdict, to try to justify the excessive award. The problems with the positions taken by the trial court and the court of appeal are readily apparent.

First, Appellant was tried on a cause of action which resulted in significant punitive damages without reasonable notice. There was never any leave to amend granted, even at trial, to support the addition of a new cause of action which was added to the case through jury instructions proposed by Respondent and a jury verdict form prepared by the trial court. Due process requires that litigants be apprized of the claims being asserted against them. Here, the trial court obliterated that right.

Furthermore, evidence subject to the litigation privilege (i.e. discovery responses and objections) was permitted to be introduced against Mr. Greene and appears to be the foundation for the concealment claim. The litigation privilege is an important protection to advocacy and litigants certainly should not be subject to liability based upon objections asserted by counsel.

Finally, it is the jury that was charged with deciding this action, not the court. However, rather than assist the jury in remaining within the bounds of the law in its punitive damage award, the court usurped the role of the jury in assuming free licence to read the jury's special verdicts as allocating damages among the various causes of action prosecuted by Imagine. The trial court therefore improperly aggregated both contract and tort awards as the foundation for punitive damages against

Mr. Greene, resulting is the hugely disproportionate award of $500,000 on a fraudulent concealment claim where the jury only found $2,034 in compensatory damages.

Clearly, the result in this case is unjust and in conflict with well-established legal principles of due process established by the 14th Amendment to the Constitution as construed by this Court and the United States courts of appeals. Specifically, the punitive damages in this case are squarely in conflict with the legal standards for the imposition of such punishment set forth in the seminal opinion of this Court on exemplary damages in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). Nonetheless, the trial court and California Court of Appeal have unjustifiably extended other legal precedent to justify the judgment. However, in doing so, there are inconsistencies in the application of law on important issues related to punitive damages and jury trial that requires this Court's intervention. This Court is therefore requested to grant this Petition and review this matter on its merits.

STATEMENT OF JURISDICTION

This Petition is based upon the review of a state-court judgment entered on April 19, 1999, which became final in August 2001. A timely appeal followed which upheld the judgment by an opinion entered on April 26, 2001. Rehearing of the appeal was denied on May 15, 2001 and a timely Petition for Review was made to the California Supreme Court. The California Supreme Court denied the Petition for Review on July 11, 2001.

This Petition is made pursuant to Rule 11, and is being filed pursuant to Rule 29.2 within 90 days of the denial of the Petition for Review to the state court of last resort as required by Rule 13.1. The Supreme Court therefore has jurisdiction of this Petition pursuant to 28 USC § 1257.

RELEVANT CONSTITUTIONAL PROVISION

"All persons born or naturalized in the United States and *subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

US Constitution, 14th Amendment, Section 1.

STATEMENT OF THE CASE

A. Background.

Mr. Greene owns a modern architectural house in the Brentwood neighborhood of Los Angeles, California. He rented the house on a short-term basis to Imagine for the benefit of famous actor/director Ron Howard and his family. Unfortunately for all parties involved, the rental occurred during the infamous El Niño rain storms that occurred in the beginning of 1999. It rained and the house experienced water intrusion problems. As a result, Imagine abruptly terminated the lease and litigation ensued.

Although Imagine had complained to Mr. Greene concerning limited water infiltration problems, Mr. Greene believed that these problems had been remedied by his workers based upon his communications with Imagine's representatives. Mr. Greene was therefore surprised when Imagine vacated the house and commenced the underlying action alleging that Imagine breached its lease. Imagine filed a Cross-Complaint alleging a host of contract and tort claims predicated upon complaints regarding the property, including breach of contract, breach of the implied warranty of habitability,

constructive eviction, negligent misrepresentation and fraudulent misrepresentation.

At the beginning of trial, Imagine submitted jury instructions related to all of the causes of action stated in its pleading as well as additional jury instructions for a fraudulent concealment theory. Mr. Greene made written and oral objections that no claim for concealment was stated in Imagine's pleading. Imagine's fraud cause of action was based upon claims that Mr. Greene made false misrepresentations and jury instructions had already allowed as to that claim; nowhere had Imagine pled that Mr. Greene had engaged in fraudulent concealment. Although Imagine asserted that it would amend it pleading to add the new claim in accordance with proof of liability adduced at trial, no such motion was ever made or granted. Nonetheless, when settling jury instructions during trial, the court ruled to allow Imagine to prosecute this unpled cause of action.

The trial was unfavorable to Mr. Greene from the start. Over Mr. Greene's objections, the court allowed Imagine to present large blow-ups of pictures that undisputedly exaggerated the water infiltration conditions at the house, hearsay testimony regarding alleged rodent infestation, hearsay testimony of an undisclosed expert concerning the condition of the property two years before the lease, and unqualified, non-expert testimony of alleged health and safety problems. At the same time, the court substantially excluded Mr. Greene's evidence including, among other things, expert testimony regarding an inspection of the house immediately after Imagine vacated the property, expert testimony regarding landlord's duties, blueprints of the house, and a video of the house showing its size and layout. Toward the end of trial, the court allowed Imagine to present discovery responses *and objections* to show an alleged concealment of evidence during litigation in support of the unpled fraudulent concealment claim. In sum, the trial consisted of Imagine presenting

virtually any evidence it wanted, whether or not appropriate or properly admissible, while Mr. Greene was prevented from presenting evidence material and important to his defense.

Special verdict forms prepared by the trial court were presented to the jury. The trial court gave the jury one special verdict form for each of the causes of action pled by the parties, and, despite Mr. Greene's objections, an additional verdict form for the unpled cause of action for fraudulent concealment. Each of the verdict forms asked the jury to state *the total amount of all damages* the prosecuting party had sustained based upon the conduct that was the basis for the cause of action pertaining to that verdict form. For the causes of action involving intentional torts–Imagine's claims for constructive eviction, fraudulent misrepresentation, and fraudulent concealment–the verdict forms also asked if the conduct forming the basis for the particular cause of action at issue was committed with fraud, oppression or malice which are required to support an award of punitive damages under California law.

The jury completed the verdict forms, dismissing Mr. Greene's claims and awarding Imagine a total of $104,816 in compensatory damages against Mr. Greene, largely on contract causes of action. Three of the verdict forms on Imagine's causes of action inquired about the imposition of punitive damages–constructive eviction, fraudulent misrepresentation and fraudulent concealment. Of the three, it is only on the verdict form for the unpled fraudulent concealment claim that the jury found punitive damages were warranted. For that claim, the jury found that the total amount of compensatory damages that Imagine had sustained was only $2,034. Despite the small compensatory award on the fraudulent concealment claim, the trial court allowed Imagine to argue (over Mr. Greene's objections) that a punitive damage award could be based upon all of the compensatory damages, including the cause of action for the return of Imagine's $50,000 security

deposit and the other contract claims where punitive damages are unsupported as a matter of law and tort claims where the jury had found punitive damages inappropriate. The trial court reasoned that the jury allocated damages among the claims even though the jury was specifically instructed to state the total amount of damages sustained by virtue of the fraudulent concealment in the verdict form for that claim. As a result of the trial court's improper aggregation of damage awards, the jury returned a disproportionate punitive award of $500,000.

On appeal, Imagine expanded upon its story even beyond the skewed evidence presented at trial. As a result of exaggerations by Imagine, the California Court of Appeal Opinion pervasively strays from the evidence into the alternate reality created by Imagine to support its claims. In doing so, the Court of Appeal also indulged in second guessing the jury's intent with respect to the award of compensatory damages in the special verdict forms, upholding the judgment entered by the trial court. Mr. Greene pursued a Petition for Rehearing with the California Court of Appeal and a Petition for Review of the appellate decision with the California Supreme Court. Both Petitions were summarily denied without opinion.

After summary denial of the Petition for Review by the California Supreme Court, the judgment in the state court became final and is now subject to collection by Imagine. (There is also a motion by Imagine pending which seeks the award of an additional $165,000 of attorney's fees related to the appellate proceedings.) Mr. Greene therefore has no other recourse for this grave miscarriage of justice other than to seek relief from this Court.

B. Objections in State Court Proceedings.

The Constitutional issue raised in this Petition pertains to the violation of Mr. Greene's right to due process by the imposition of an excessive award of punitive damages, which

was compounded by the fact that the punitive award was based upon an unpled cause of action for fraudulent concealment. Objections were raised as to the prosecution of the unpled cause of action and the punitive award at every stage of the underlying proceeding:

- Written objections were filed with the trial court as to Imagine's jury instructions regarding fraudulent concealment as not supported by a cause of action contained in Imagine's pleading. The trial court overruled the objections on the record.

- Oral objections were made during trial when jury instructions were being settled as to Imagine's jury instructions regarding fraudulent concealment as not supported by a cause of action contained in Imagine's pleading. The trial court overruled the objections on the record.

- Oral objection was made to the trial court's special jury verdict regarding a legal theory of fraudulent concealment as not supported by a cause of action contained in Imagine's pleading. The trial court overruled the objection on the record.

- Oral objections were made during trial regarding the aggregation of compensatory damages in Imagine's argument to the jury as to the appropriate amount of punitive damages that should be awarded. The trial court stated that the total of all compensatory damages could form the basis for the punitive award, not just the compensatory damages awarded on the fraudulent concealment claim.

- Immediately after judgment, a motion for a new trial was made in the trial court, attacking, among other things, the award of punitive damages as excessive and

predicated on an unpled claim. The trial court denied the motion, again taking the position that all compensatory damages could form the basis for the punitive award, not just the compensatory damages awarded on the fraudulent concealment claim.

A timely appeal was taken from the judgment. In his briefing, Mr. Greene attacked, among other things, the award of punitive damages as excessive and predicated on an unpled claim at the appellate level. With respect to these issues, the appellate court's opinion states:

"Imagine's fourth cause of action was for fraud and intentional misrepresentation. In that count, it was alleged that Greene had made a number of representations regarding the condition of the leased premises including such material misrepresentations that all leaks had been repaired and the house had not sustained any water infiltration during the proceeding two and one-half years. Given what was proven at trial, it is obvious that these allegations, liberally construed, embraced the claim that Greene knew of and failed to disclose numerous problems with the house."

"Imagine contends that the relevant 'compensatory' award, by which the reasonableness of the punitive award should be measured, is the total compensatory damages awarded by the jury on all claims. The trial court agreed with this argument and so do we."

The California Court of Appeal therefore upheld the award of punitive damages of $500,000. (See, Opinion (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three

entered on April 26, 2001, in Greene v. Imagine Entertainment, Case Number B133119 [included in the Appendix hereto at pages 31-61].)

- A timely Petition for Rehearing was made to the appellate court. Among other things, Mr. Greene argued that the court failed to appreciate the due process violations attendant to the excessive punitive award on the unpled claim of fraudulent concealment. The California Court of Appeal summarily denied this Petition. (See Order (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three dated May 15, 2001, on Petition of Jeff Greene for rehearing of appeal in Greene v. Imagine Entertainment, Case Number B133119 [included in the Appendix hereto at page 62].)

- Mr. Greene made a timely Petition for Review to the California Supreme Court, arguing that the appellate court's upholding the excessive punitive award on the unpled claim of fraudulent concealment was in violation of his due process rights, among other things. The California Supreme Court summarily denied this Petition. (See Order of the Supreme Court of California entered on July 11, 2001, on Petition for Review of Jeff Greene in Greene v. Imagine Entertainment, Case Number S098068 [included in the Appendix hereto at page 63].)

In each of the post-trial proceedings, Mr. Greene argued the factors of that this Court established as determining whether a punitive award is excessive in *BMW of North America, Inc. v. Gore, supra*, as well as the underlying policy that punitive damages should not go beyond their purpose to punish and deter unlawful conduct. The issue of the excessiveness of the punitive award based upon an unpled claim was properly and repetitively raised by Mr. Greene so

that this Court has jurisdiction to proceed on this Petition for a Writ of Certiorari.

ARGUMENT

I. THE CALIFORNIA COURTS' UPHOLDING OF THE EXCESSIVE PUNITIVE DAMAGE AWARD CONFLICTS WITH PRINCIPALS OF CONSTITUTIONAL DUE PROCESS AS ESTABLISHED BY THE DECISIONS OF THIS COURT.

The due process clause of the 14th Amendment to the Constitution prohibits states from imposing grossly excessive punishment on a tortfeasor through punitive damages. *BMW of North America, Inc. v. Gore, supra, 517 U.S. 559, 562.* It is the duty of the courts to determine whether punitive damages are constitutionally unacceptable. *Pacific Mut. Life Ins. Co. v. Haslip*, 449 U.S. 1, 18-19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). In discharging this duty, the court must (1) ascertain whether the jury was properly instructed, (2) determine if the trial court set forth reasons supporting the punitive award, and (3) evaluate the award for excessiveness. *Id.* at 16-18. This duty extends to state courts. *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir. 1993).

The purpose of punitive damages is "punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore, supra, 517 U.S. 559, 568.* Punitive damages are therefore founded upon advancing the State's interest of attempting to prevent unlawful conduct. *Id.* The evaluation of punitive damages must therefore be made in the context of the State's interest in the conduct at issue. *Id.*

Because punitive damages are founded upon the State's interest in addressing unlawful conduct, "[p]unitive damages should not go beyond deterrence and become a windfall." *DeRance, Inc. v. PaineWebber Inc.*, 872 F.2d 1312, 1328 (7th Cir.

1989). Concern for creating a windfall for the plaintiff is "paramount where plaintiffs have been awarded substantial compensatory damages." *Id.* An award of punitive damages is excessive when it go beyond the aims of punishment and deterrence. *Stafford v. Puro*, 63 F.3d 1436, 1444 (7th Cir. 1995).

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of North America, Inc. v. Gore, supra, 517 U.S. 559, 574.* In the *BMW* decision, this Court established a three-prong framework for determining whether a punitive award is within constitutional bounds or is excessive. This analysis considers (1) the reprehensibility of the conduct, (2) the ratio of the punitive award to the harm caused in terms of the compensatory damages, and (3) a comparison to other cases or fines and penalties that would attach to the subject conduct through criminal or administrative proceedings. *Id.* at 575.

BMW of North America, Inc. v. Gore involved a plaintiff who was aggrieved because an automobile dealer sold him a "new" car without disclosing that it had been repainted in part due to damage to its finish. The automobile dealer did not know that the car had been repainted since it was BMW's practice to not to provide such information to its dealers when the repair of a new automobile involved less than three percent of its value. The plaintiff therefore sued BMW for fraud based upon its withholding of this information.

The plaintiff's damages were determined to be $4,000 based upon the diminution in value of automobile related to its refinishing. In addition, the plaintiff obtained an award of $2,000,000 of punitive damages which was ultimately overturned by this Court.

It this Court's application of its three-prong analysis of the punitive award, the Court first looked to the reprehensibility of the conduct. This Court considered that the case involved purely economic harm and that there were no aggravating factors such as violence or a repeated conduct after a prior adjudication. 517 U.S. at 576. Furthermore, this Court noted that an omission is less culpable than an affirmative misrepresentation, especially where the omission is made in good faith. *Id.* at 580. This Court concluded that the punitive award was not reasonably related to the conduct at issue and therefore excessive from the perspective of the reprehensibility of the offense.

The Court then looked at the ratio of punitive damages to the compensatory damages: 500-to-1 in the *BMW* case. This Court noted that it had previously held in *Pacific Mut. Life Ins. Co. v. Haslip*, *supra*, that a 4-to-1ratio was "close to the line" of unconstitutionality. 517 U.S. at 581. The Court therefore found that the 500-to-1 ratio was clearly excessive. *Id.* at 583.

Finally, the Court compared the punitive award to the amount of civil penalties that would attach to BMW's conduct as a matter of state law. Inasmuch as punitive damages are founded upon advancing the States' interests, it is logical to look at what the States themselves have deemed appropriate as a penalty for the conduct at issue. The Court found that the civil penalties imposed by the States for deceptive trade practices to be in the $2,000 to $10,000 range. The Court therefore found the $2,000,000 punitive award to be significantly beyond any civil penalty that could attach to BMW's conduct and excessive as a matter of constitutional law.[1]

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[1]See, also, *Watkins v. Lundell*, 169 F.3d 540, 546 (8th Cir. 1999) [applying the principles of *BMW of North America, Inc. v. Gore, supra*, and *Pacific Mut. Life Ins. Co. v. Haslip, supra*, the Court found that it had been established that a 4-to-1 ratio between

The California courts clearly have strayed from the constitutional limitations on punitive damages established by this Court as is evident by the upholding of the $500,000 punitive award against Mr. Greene.

A. *The Punitive Award is Excessive in Light of the Reprehensibility of the Conduct.*

Although the California courts paid much attention to the conditions that Imagine claimed to exist at the property and the claimed lack of corrective measures, the punitive damage award is based upon Imagine's unpled claim for concealment of information as to the house's history of water infiltration problems. The evidence showed that there were only minor water infiltration problems in the years immediately before Imagine's tenancy although prior to that there were a number of leaks that had been repaired. (See Opinion of the California Court of Appeal set forth in the Appendix hereto.) It was only during the severe El Niño storms after Imagine took possession of the property that the house experience significant infiltration problems.

As in *BMW of North America, Inc. v. Gore, supra*, there are no aggravating factors here. There was no violence or physical injury; there was no prior "conviction" for the conduct at issue. Furthermore, the claim involved an omission of information, not an affirmative misrepresentation. The failure to disclose a two-year-old report noting repaired water leaks is therefore not sufficiently substantial reprehensible conduct to justify a punitive award of $500,000. The California courts have therefore failed to conform to the law established by this Court.

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punitive damages and compensatory damages was "close to the line of constitutional impropriety" for fraud and that a punitive award of $3,500,000 was excessive in light of the civil fine for fraudulent practices being $10,000].

B. *The Ratio of the Punitive Award to Compensatory Damages is Excessive.*

The threshold issue with respect to evaluating the ratio of punitive to compensatory damages in this case is whether the analysis should be based upon the compensatory damages award for the conduct at issue or whether the compensatory damages for all claims in this action should be aggregated. There are apparently conflicting California appellate decisions on this point.

In *Auerbach v. Great Western Bank*, 74 Cal.App.4th 1172 (1999), the jury awarded contract damages for breach of contract, tort damages for promissory fraud and fraudulent concealment, and imposed punitive damages. 74 Cal.App.4th at 1184. On review, the appellate court examined the punitive damages awarded solely within the context of the fraud claims. *Id.* The court held that since the punitive damages were not proportional to recoverable compensatory damages for fraud, the punitive damages claim had to be retried. *Id.* at 1190.

The position advocated by Imagine that all compensatory damages can be viewed to support the punitive award based upon *All West Design v. Boozer,* 183 Cal.App.3d 1212 (1996), is squarely at odds with this precedent. *All West* was a "no double recovery" case. In that case, the evidence established that the total damages were *exactly* $10,975. There were two special fraud verdicts identifying different fraudulent conduct. On the first fraud verdict, the jury awarded $1,625; on the second the jury wrote, "No further damages." *Id.* at 1221. The jury awarded $9,350 in contract damages which, added to the $1,625 in fraud damages, was exactly $10,975. The issue on appeal was *not* whether punitive damages should be evaluated in relation to the sum of contract damages and fraud damages; rather, the issue was whether punitive damages should be been awarded at all. *Id.* Because of the evidence that the total damages were exactly $10,975, the trial

court reasoned that "No further damages" indicated that the jury had allocated the damages to prevent a double recovery by the plaintiff. *Id.* at 1222-23.

Here, there was no justification for the California courts' adopting the *All West* reasoning regarding the jury's awards of compensatory damages. With respect to the fraudulent concealment claim, the jury was instructed to state the amount of *all damages* Imagine sustained related to that claim. (See Judgment on Special Verdict set forth in the Appendix hereto.) The special verdict form for the concealment claim asked: "What is the *total amount of all damage* suffered by plaintiff Imagine Entertainment and caused by the concealment or suppression of the fact?" [Emphasis added.] The jury responded: "$2,034." It is presumed as a matter of law that the jury followed the court's instructions. *Weeks v. Baker & McKenzie*, 62 Cal.App.4th 1128, 1163 (1998).

The court was required to give integrity to the jury's special verdict. It must assume that the jury answered the question it was asked, and therefore that $2,034 is the "total amount of all damage" caused to Imagine "by the concealment or suppression of [a] fact." *See Tavaglione v. Billings*, Cal.4th 1150, 1157 (1993) [holding that jury's special interrogatory responses attributing damages to different claims precluded court from assuming that damages were meant by jury to apply to other claims]; *Myers Bldg. Indus. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 960-61 (1993) [holding that courts are without power to imply findings where the special verdict did not make such findings]. If the court believed that the jury did not in its special verdict state the "total amount of all damage" caused by the alleged concealment, then the court should have overturned the judgment based on jury misconduct. *See Manufacturers' Finance Corp. v. Pacific Wholesale Radio, Inc.*, 130 Cal.App. 239, 242-44 (1933) [affirming grant of new trial where jury in awarding damages on separate claims failed to follow court's instructions]; *see also Krouse v. Graham*, 19 Cal.

3d 59, 81 (1977) [agreement by jury to award attorneys' fees as part of compensatory damage award in violation of court's instruction constitutes jury misconduct].

The jury would not be familiar with the legal precedent that attempts to *delimit* excessive punitive awards. Consequently, there is no reason to think that the jury would be reluctant to award $500,000 on a $2,034 compensatory judgment. The courts therefore should have trusted that the jury followed the trial court's instructions as is favored by law rather than make assumptions based upon the excessive punitive award. *Weeks v. Baker & McKenzie, supra.* There is no justification for finding that the jury made a mistake in failing to award $50,000 or $100,000 as all damages related to the fraudulent concealment claim as opposed to finding that the jury made a mistake in making an excessive award, especially when the jury had no idea that a punitive award could be excessive. The courts therefore should have accepted the jury's award of $2,034 on the concealment claim at face value.

Regardless of whether the compensatory award on the fraudulent concealment claim alone or the aggregation of all compensatory awards is considered in evaluating the punitive award, it is clear that the award is excessive that the California courts' upholding of the award conflicts with the jurisprudence established by this Court. Even the California Court of Appeal acknowledges that a 245-to-1 ratio between punitive and compensatory damages would be excessive. Moreover, the Court admits that "the $50,000 security deposit is not an item of damage resulting from Greene's misconduct." (See, Opinion of the Court of Appeal set forth in the Appendix hereto.) However, the Court of Appeal nonetheless states: "[W]e have no trouble concluding that the approximate 5:1 (or even 10:1) ratio involved here ... is entirely appropriate." (*Id.*)

This Court established in *Pacific Mut. Life Ins. Co. v. Haslip, supra*, that a 4-to-1 ratio is "close to the line." A 5-to-1 ratio, or more accurately a 10-to-1 ratio or 245-to-1 ratio, is certainly "over the line." The decisions of the California courts are therefore in direct conflict with the decisional authority of this Court and this Court's intervention is appropriate.

C. *The Punitive Damages are Excessive in Comparison to State Set Fines and Precedent.*

The State's interest involved here would be to prevent a person from obtaining money–in this case rent–through misrepresentation. California Penal Code Section 532 makes it a crime to obtain property by fraud. Penal Code Section 672 sets the fine for grand theft at $10,000. The State of California has therefore determined that a monetary fine of $10,000 is an adequate financial penalty for the conduct at issue here if it were criminal.

In *BMW of North America, Inc. v. Gore, supra*, this Court also found that fines for deceptive practices involving the omission of information generally involved monetary fines of no more than $10,000. *Accord, Watkins v. Lundell, supra.* Consequently, precedent establishes that the appropriate punitive award for fraudulent conduct is in the tens of thousands, not the hundreds of thousands of dollars. Beyond such amounts, the plaintiff is simply receiving a windfall.

In this regard, most awards of punitive damages are no more than one percent of the party's net worth. *Cash v. Beltman North America Co., Inc.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990). More than that is excessive. *See, id.* [punitive award of 8.29% of net worth held excessive]; *Vasbinder v. Scott*, 976 F.2d 118, 121 (2nd Cir. 1992) [punitive award of 40% of liquid assets excessive].

Here, the California courts have endorsed a punitive award squarely at odds with this precedent. The punitive award is five hundred times the fine that would be imposed by California Penal Code Section 672 and constitutes between five and ten percent of Mr. Greene's net worth.[2] The California Court of Appeal specifically held that an award of five percent of net worth is acceptable. (See Opinion of the California Court of Appeal set forth in the Appendix hereto.)

The judgment already includes a substantial compensatory award for Imagine in excess of $100,000, as well as an award of attorney's fees and costs of $300,000. (Imagine has a motion pending requesting an additional $165,000 of attorney's fees.) Consequently, even without the punitive award, Mr. Greene is faced with a judgment for four to six times the amount of all of the compensatory damages. This is sufficient punishment and deterrence by itself. The award of an additional $500,000 as exemplary damages goes far beyond the amount necessary to punish and deter the conduct at issue and is simply a windfall for Imagine. From a notice perspective, Mr. Greene certainly could have never expected that this case would result in a judgment in excess of $1,000,000. The California courts' upholding of the punitive award therefore conflicts with this Court's precedent and this Court's intervention is required.

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[2]Although not noted by the California Court of Appeal, the punitive award is also in excess of all of Mr. Greene's liquid assets.

II. THE AGGREGATION OF COMPENSATORY AWARDS AS THE FOUNDATION FOR THE DETERMINATION OF WHETHER A PUNITIVE AWARD IS EXCESSIVE, IS AN IMPORTANT QUESTION OF LAW THAT SHOULD BE SETTLED BY THIS COURT.

As discussed above, there is apparently a discrepancy in California precedent concerning the aggregation of damages for the purpose of evaluating the punitive award made in this action. This is certainly an extremely important question of law since it forms the basis of an analysis of whether punitive damages are excessive and therefore unconstitutional.

The California Court of Appeal's unsupported extension of the decision in *All West Design v. Boozer, supra,* would give courts wide latitude to uphold huge punitive awards by reference to conduct and damages outside the scope of the activity that justifies punishment. Not only is it improper to punish such other conduct, but the amount of the punishment is going to be inherently excessive.

This case exemplifies how a court relying on *All West* rather than respecting the jury's verdicts is patently unjust. Mr. Greene is being punished, not only for fraudulent concealment, but also for breaches of contract. Moreover, the disproportionate harm caused by the fraud and the contractual breaches make the punitive award that much more unjust. This Court should therefore grant review of this matter to resolve whether damages can be aggregated to justify what is clearly a disproportionate and unjust punitive award.

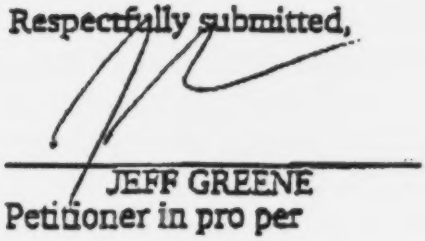
CONCLUSION

The California courts have clearly strayed from the jurisprudence of this Court regarding the imposition of punitive damages in civil actions. The award of $500,000 punitive damages against Mr. Greene far exceeds any State purpose in

punishing and deterring the conduct at issue, especially inasmuch as Mr. Greene is subject to liability for a significant compensatory award and three to five times that amount as an award of attorney's fees and costs to Imagine. The additional punishment of being required to pay $500,000 on top of the other awards, it purely a windfall to Imagine and unconstitutional. This Court is therefore respectfully requested to grant certiorari and set this matter for argument on its merits.

DATED: October 9, 2001

Respectfully submitted,



JEFF GREENE
Petitioner in pro per

APPENDIX

1. Judgment on Special Verdict entered April 19, 1999 by the Superior Court of the State of California for the County of Los Angeles in Greene v. Imagine Entertainment, Case Number BC 189133 (pages 23-30).

2. Opinion (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three entered on April 26, 2001, in Greene v. Imagine Entertainment, Case Number B133119 (pages 31-61).

3. Order (unpublished) of the Court of Appeal of the State of California, Second Appellate District, Division Three dated May 15, 2001, on Petition of Jeff Greene for rehearing of appeal in Greene v. Imagine Entertainment, Case Number B133119 (page 62).

4. Order of the Supreme Court of California entered on July 11, 2001, on Petition for Review of Jeff Greene in Greene v. Imagine Entertainment, Case Number S098068 (page 63).

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ORIGINAL FILED
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APR 19 1999
SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

JEFF GREENE, an individual, Plaintiff, vs. IMAGINE ENTERTAINMENT, et al, Defendants. AND RELATED CROSS-ACTION.	No. BC 189133 JUDGMENT ON SPECIAL VERDICT Trial Date: March 3, 1999 Time: 8:30 a.m. Dept: 52

This action came on regularly for trial on March 3, 1999, in Department 52 of the Superior Court, the Honorable Susan Bryant-Deason Judge presiding; the Plaintiff/Cross-Defendant appearing by attorneys and the Defendants/Cross-Complaint appearing by attorneys.

A jury of 12 persons was regularly impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury with directions to return a verdict on special issues. The jury deliberated and thereafter returned into court with its verdict consisting of the special issues submitted to the jury and the answers given thereto by the jury, which said verdict was in words and figures as follows, to-wit:

Special Verdict 1:

Question No. 1: Do you find that Imagine breached the contract that is the subject of this action?

Answer: No.

Question No. 2: What is the total amount of damages that you find Greene sustained as a result of Imagine's breach of the contract?

Answer: n/a

Question No. 3: Do you find that Greene breached the contract that is the subject of this action?

Answer: Yes.

Question No. 1: What is the total amount of damages that you find Imagine sustained as a result of Greene's breach of the contract?

Answer: $3,282.00

Special Verdict 2:

Question No. 1: Is Imagine entitled to recover its $50,000 security deposit from Greene?

Answer: Yes.

Question No. 2: Is Greene entitled to keep the $50,000 security deposit obtained from Imagine as an offset against any unpaid rent?

Answer: No.

Special Verdict 3:

Question No. 1: Did Greene breach the warranty of habitability in connection with his lease of the Oakmont Property to Imagine?

Answer: Yes.

Question No. 2: If you find that Greene breached the warranty of habitability in connection with his lease of the Oakmont Property to Imagine, then what is the total amount of damages to which Imagine is entitled?

Answer: $28,500.

Question No. 3: If you find that Greene did not breach the warranty of habitability in connection with the Oakmont Property, is Greene entitled to recover damages?

Answer: n/a

Special Verdict 4:

Question No. 1: Was Howard Production, Inc., Imagine Entertainment, Grazer Productions, inc. (hereafter collectively referred to as "Imagine") constructively evicted from the Oakmont Property?

Answer: Yes.

Question No. 2: What is the total amount of damages suffered by Imagine as a result of their constructive eviction3

Answer: $21,000.

Question No. 3: Do you find by cleat and convincing evidence that Greene committed oppression, fraud and/or malice, or any them, in the conduct upon which you base your finding of liability for constructive eviction?

Answer: No.

Special Verdict 5:

Question No. 1: Did defendant Greene make a representation as to a past or existing material fact?

Answer: Yes.

Question No. 2: Was the representation false?

Answer: Yes.

Question No. 3: Did defendant Greene make the representation without any reasonable grounds for believing it to be true?

Answer: No.

Special Verdict 6:

Question No. 1: Did defendant Greene conceal or suppress a material fact?

Answer: Yes.

Question No. 2: Did defendant Greene intentionally conceal or suppress the fact with the intent to defraud plaintiff Imagine Entertainment?

Answer: Yes.

Question No. 3: Was plaintiff Imagine Entertainment aware of the fact as the time plaintiffs acted?

Answer: No.

Question No. 4: Would plaintiff Imagine Entertainment have acted in the way it acted if plaintiff had known of the concealed or suppressed fact7

Answer: No.

Question No. 5: Did defendant Greene's concealment or suppression of the fact cause plaintiff Imagine Entertainment damage?

Answer: Yes.

Question No. 6: What is the total amount of all damages suffered by plaintiff Imagine Entertainment and caused by the concealment or suppression of the fact?

Answer: $2,034.00.

Question No. 7: Do you find by clear and convincing evidence that defendant Greene committed oppression, fraud, and/or malice, or any of them, in the conduct upon which you base your finding of liability for fraudulent concealment?

Answer: Yes.

Special Verdict 7:

Question No. 1: Did defendant Greene make a representation as to a past or existing material fact?

Answer: Yes.

Question No. 2: Was the representation false?

Answer: Yes.

Question No. 3: Did defendant Greene make the representation recklessly without knowing whether it was true or false?

Answer: Yes.

Question No. 4: Did defendant Greene make the representation with an intent to defraud plaintiff Imagine Entertainment?

Answer: Yes.

Question No. 5: Was plaintiff Imagine Entertainment aware of the falsity of the representation?

Answer: No.

Question No. 6: Did plaintiff Imagine Entertainment act in reliance upon the truth of the representation?

Answer: Yes.

Question No. 7: Was plaintiff Imagine Entertainment justified in relying upon the representation?

Answer: Yes.

Question No. 8: Did defendant Greene's misrepresentation cause plaintiff Imagine Entertainment damage?

Answer: Yes.

Question No. 9: What is the total amount of all damage suffered by plaintiff Imagine Entertainment and caused by the reliance upon the truth of the representation?

Answer: $ 0:00.

Question No. 10: Do you find by clear and convincing evidence that defendant Greene committed oppression, fraud and/or malice, or any of them, in the conduct upon which you base your, finding of liability for intentional misrepresentation?

Answer: Deadlocked.

Special Verdict Re Punitive Damages:

Question No. 1: Shall punitive damages be assessed against cross-defendant Jeffrey Greene?

Answer: Yes.

Question No. 1: We assess punitive damages against cross-defendant Jeffrey Greene in the following amount:

Answer: $500,000.

It appearing by reason of said special verdicts that Defendants Imagine Entertainment, Howard Productions, Inc. and Grazer Productions, Inc. are entitled to judgment against Plaintiff Jeffrey Greene. It further appears by reason of said special verdicts that Cross-complainant Imagine Entertainment is entitled to judgment against Cross-defendant Jeffrey Greene in the amount of $616,446.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

(1) Defendants Imagine Entertainment, Howard Productions, Inc. and Grazer Production, Inc. have judgment that Plaintiff Jeffrey Greene take nothing;

(2) Cross-complainant Imagine Entertainment have judgment against Cross-defendant Jeffrey Greene for compensatory damages in the sum of $104,816, with prejudgment interest in the sum of $8,608.07, and punitive damages in the amount of $500,000, for a total sum of $613,424.07.

(3) Defendants Imagine Entertainment, Howard Productions, Inc. and Grazer Productions, Inc. and Cross-complainant Imagine Entertainment recover from Plaintiff/Cross-defendant Jeffrey Greene costs, including attorneys' fees, and disbursements in the sum of $_____.

Dated: 4/19/99

/s/ Susan Bryant-Deason
Judge of the Superior Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JEFF GREENE,	)	B133119
	)	
Plaintiff and Appellant,	)	(Los Angeles County Super.
	)	Ct. No. BC189133)
v.	)	
	)	
IMAGINE ENTERTAINMENT, ET AL.,	)	
	)	
	)	
Defendants and Respondents.	)	
	)	

COURT OF APPEAL - SECOND DIST.
FILED
APR 26 2001
JOSEPH A. LANE Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Susan Bryant-Deason, Judge. Affirmed.

Charlotte E. Costan; Burgee & Abramoff and John G. Burgee for Plaintiff and Appellant.

Crosby, Heafey, Roach & May, Kurt C. Peterson, James C. Martin, Kathy M. Banke and L. Amy Blum for Defendants and Respondents.

This action arises out of a residential lease which the lessor plaintiff and appellant, Jeff Greene (Greene), claims was breached by the lessee defendant and respondent, Imagine

Entertainment, a general partnership (Imagine), in which director Ron Howard is a partner. The lease was entered into by Imagine to provide living quarters for Howard and his family (the Howards) during a seven month period in 1998 when he was in Los Angeles directing a film. After less than 45 days into the lease, the Howards moved out of the residence claiming that it was not habitable and that they had been constructively evicted. The Howards demanded return of their security deposit ($50,000) and Greene filed this action for breach of the lease seeking recovery of approximately $100,000 in unpaid rent. Imagine cross-complained for return of the security deposit, breach of implied warranty of habitability, constructive eviction and fraud. After a jury trial, a judgment was entered in favor of Imagine for substantial compensatory and punitive damages, as well as interest, costs and attorney's fees.

After a review of the record, we are persuaded that substantial evidence supports the jury's factual determinations and its award of both compensatory damages and punitive damages. Therefore, the judgment will be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND[1]

On December 16, 1997, Imagine entered into a seven month residential lease to commence on January 1, 1998. The leased premises was a large house owned by Greene and was located at 23 Oakmont in Los Angeles. The purpose of the lease was to provide living quarters for the Howards and their four teenaged children while Howard was in Los Angeles for the filming of a movie. The lease was negotiated by a real estate agent on behalf of Imagine.

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[1]In accordance with the usual rules on appeal, we recite the facts in the light most favorable to the judgment.

In mid-December 1997, Greene personally showed the house to the Howards. While they liked many things about the house (e.g., its size, location, views etc.), they were disturbed by such things as dingy and dirty carpets and clouded windows.[2] Greene claimed that all that was needed was a good cleaning which he promised to provide. He specifically represented that "everything works, everything is great." The Howards accepted these representations and authorized the real estate agent to negotiate the lease.

The agent did so. During the lease negotiations the agent, concerned about apparent water stains and predictions of a coming heavy rainy season (El Niño), asked Greene whether the house had ever had any leaks. Greene acknowledged that there had been some leaks years before, but they had all been fixed. He assured the agent there had not been any leaks in the previous two and one-half years. Most significantly, he did not disclose a detailed written inspection report prepared at the request of a previous tenant in March of 1996 which described multiple examples of widespread water leakage.[3] In addition, Greene did not disclose that he had

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[2]Greene was also asked about a possible rodent problem after the Howards noticed a rat trap in the laundry room. He responded that no rodent problem existed.

[3]This was the so-called Boatwright/Holmes report dated March 20, 1996 which had been delivered to Greene on or about March 25, 1996. As summarized in Imagine's brief on appeal, the report described numerous examples of water leakage damage:

"*Kitchen*: 'Drywall repair is needed to the wall at the junction of the door framing (hinge side) in the pantry area. Several of the windows are leaking (i.e., seal is broken between the dual panes of glass) ... Apparent water damage was noted to some areas of the cabinets.' [¶] *Dining and Living Rooms*:'We observed two sliding glass door panes with condensation leakage (noted from the kitchen/dining area). We also observed one window which has condensation leakage (at the family/living room area).' 'Evidence of possible water penetration noted at the east wall

received two written complaints from the previous tenant about continuing water leakage in late January 1997, just eleven months prior to his representations to the Howards and the agent during negotiations of the lease. In reliance on what Greene said and did not say, a seven month lease was negotiated. It provided for a monthly rental of $28,500, a security deposit of $50,000, and included a broad attorney's fee clause.

The Howards moved into the house on January 5, 1998. To their dismay they soon discovered that Greene's representations regarding the condition of the premises were not accurate. For example:

(1) the security gate did not work and despite repeated demands it was not repaired by Greene;

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adjacent the living room (this area is below grade level).' [¶] *Bedrooms*:'The hardwood flooring at the lower level bedroom hall is cupped/warped (indicates moisture damage) ....[In the north guest room], [e]vidence of water leakage was noted at the ceiling (appears to be from deck above).... [In middle guest room], [m]ildew was noted at the ceiling (indicates presence of moisture). The carpet is stained (possibly from water) ... [In the south guest room], [e]vidence of water leakage was noted on ceiling. Unevenness was noted at the flooring (beneath carpet) ... [In the master bedroom], [w]e were unable to determine why a plastic covering has been placed between the ceiling and windows at the west wall. Possible water stains were noted at this covering.... Staining was noted at the wardrobe carpet.' [¶] *Media Room/Den*: 'There has been a recent occurrence of water intrusion. The seller indicates that a blocked drain was the source. The media room was the most severely affected (saturated carpet noted, damaged hardwood flooring etc.).' Water penetration was noted with the dual glazed windows at the Media Area and Billiard Area (indicates the seal between the windows is broken). Inadequate weather stripping was observed at the north exterior doors. The wall ledger at the Media Area is scratched/stained. The carpet at this area is also stained.' "

(2) there was in fact a serious rodent problem; despite a promised house cleaning, rat droppings were found throughout the house, including the children's bedrooms, and they managed to find and eat any food left out, including a welcoming fruit basket left for them on the day they moved in;[4]

(3) appliances did not work; the stove had to be lighted with matches as rats had eaten through the ignition wiring; one of the refrigerators did not keep food cold and a clothes dryer failed to heat properly; dimmer switches became hot to the touch, thermostats did not work and there were a number of exposed rusted electrical outlets in the floor (caused by water seepage) that were both a fire hazard and a safety risk;

(4) there were a number of plumbing problems including consistently dirty water in the master bath, Jacuzzi jets in the bathtub which did not work, an absence of any hot water in the bathtub and no water at all in the maid's room shower;

(5) the double glazed windows throughout the house were not just "dirty" as Greene had represented, but were internally calcified and permanently damaged because of water leakage;[5]

(6) the swimming pool was dirty when the Howards moved in and the heater never worked; and

(7) mildew permeated the furniture and carpeting despite the promised cleaning and a second cleaning which the

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[4]When this matter was called to Greene's attention, he offered to leave his cat.

[5]Another matter Greene did not disclose was the fact that he had a then pending lawsuit against the window manufacturer because of this condition.

Howards had done; it appeared that the staining of the carpet and some of the furniture was the result of mold and mildew.

Despite their disappointment at discovering these conditions after they moved in, the Howards were prepared to remain in the house through the lease term, although they made demands on Greene to make the needed repairs. Then, however, the heavy El Niño rains of the winter of 1998 began. The Howards had been in the house about four days when they started.

As anticipated by the Boatwright/Holmes report, the patching and caulking which Greene claimed had "fixed" previous water leakage problems, were not effective. The rains produced leaks throughout the house. When Greene was contacted he simply sent out his handyman to do more caulking. However, when it rained again during the following week, the house continued to leak. When Greene was again contacted he simply sent out his handyman. At this point, the Howards' agent recommended that Greene send someone other than a handyman. Greens asked two roofing contractors to conduct an inspection. The first contractor advised him that even a limited visual inspection revealed leaks in the kitchen, stairwell, bedrooms, bathroom, and den that were caused by defects in the flashing, water proofing and roofing. The contractor recommended further testing to fully evaluate the situation and come up with a permanent solution. The second contractor recommended that Greene hire additional contractors to repair the decks and window glazing. Greene refused to authorize any work, and said his handyman could and would take care of the property.[6]

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[6]The Howards also tried to get Greene to fix many other problems and to reimburse them for repairs they had made. However, Greene was reluctant to pay for anything but finally agreed to reimburse the Howards for the stove repair, rescreening the sliding door, part of the cost to repair the shower in the maid's

By the first week of February, it had rained four times. The leaking had grown worse with each storm to the point that water would stream down walls and the carpeting would become soaked in a number of spots. Virtually every room in the house was affected. The kitchen ceiling leaked onto the cabinets and island counter. The breakfast room windows and doorway leaked. The dining room walls leaked. The living room walls leaked. The living room ceiling leaked -- including onto a piano that the Howards had rented. The walls in the master bedroom closet leaked, and the master bathroom leaked. The stairwell to the lower level was constantly wet. The carpet at the foot of the stairs was saturated. The laundry room on the lower level repeatedly filled with water. The ceiling in the den on the lower level leaked, beads of moisture appeared on the walls, and the carpet finally became saturated and puddles started forming.

When it rained again the weekend of February 7, the leaking became worse. The Howards were having a 13th birthday party for their twin daughters, and nine youngsters were visiting from the East Coast. Once again, the house was swamped. It smelled awful, one of the youngster's allergies flared up, and this time both Cheryl Howard and one of her daughters slipped on the wet floors. The Howards spent much of the weekend manning a bucket and towel brigade.

To the Howards these circumstances were intolerable and they moved out of the house. On February 11, 1948, Imagine's attorney notified Greene that the house was uninhabitable and that the Howards had left. Greene was

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room, and the tub inspection. Greene also agreed to replace the dimmer switches and the floor plugs, to repair the security gate and to fix the roof leaks; but none of this promised work was done.

advised that, pursuant to paragraph 16 of the lease,[7] Imagine was terminating the lease as of February 7, 1998 "due to flooding from the torrential rainstorm" as of that date. Such flood, the attorney's notice stated, had "caused the premises to become uninhabitable." Demand was made upon Greene to refund the sum of $71,375, representing the $50,000 security deposit and the prorated unearned rent for February 1998.[8]

Unfortunately, Greene's response to this notice was to file this action for breach of contract on April 9, 1998. He sought recovery of the unpaid balance of the rent, plus interest and attorney's fees. Imagine answered and filed a cross-complaint alleging causes of action for (1) breach of contract (premises delivered in a defective condition which Greene failed and refused to remedy), (2) breach of implied warranty of habitability (the defective conditions made the premises uninhabitable), (3) constructive eviction (same), (4) intentional and (5) negligent misrepresentations (relating to representations and non-disclosures regarding the condition of the property) and (6) return of security deposit (as required under Civ. Code, § 1950.5 upon termination of the lease). Imagine also sought recovery of punitive damages for Green's conduct leading to the constructive eviction and for the intentional misrepresentations and non-disclosures.

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[7]Paragraph 16 of the lease provides in relevant part: "DAMAGE TO PREMISES. If the Premises are so damaged by fire or from any other cause as to render same uninhabitable, then either party shall have the right to terminate this lease as of the date on which such damage occurs through written notice to the other party, to be given within fifteen (15) days after the occurrence of such damage; ... ."

[8]Two days after the Howards had moved out it was again raining and the house was again leaking. Two ofHoward's agents were doing a walk-thru and reported the leaks to Greene by telephone.

Although during discovery Greene had denied knowledge of, or documentation relating to, any prior complaints regarding his house, Imagine ultimately was able to discover the existence of the Boatwright/Holmes report[9] just prior to trial. Greene's excuse at trial for not disclosing his knowledge and possession of this report (and the many problems it documented) was that he regarded the report as merely a request for maintenance by the prior tenant rather than a detailed report on the problems with the house. This sort of testimony was viewed by the trial court as deceitful[10]

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[9]Robert Holmes testified at trial that Greene's house was a "leaker," a term his profession (building inspections) uses to describe a house that "has a water intrusion problem."

[10]On two separate occasions toward the end of trial, once while discussing, out of the presence of the jury, Greene's possible need to be present for the second part of the trial (relating to punitive damages), the court stated:

"The Court: And, also, Mr. Greene, I'm very displeased with what I heard in this trial. And I am not convinced that I may not Sanction you for perjury and for contempt of court. And so, I don't want you to go far and I'm going to delay that ruling until the trial is over and until the verdict is in. But you are on call to this court do you understand? "Mr. Greene: I understand, your Honor. "The Court: Thank You."

The second occasion occurred during post verdict arguments regarding the viability of the jury's award of punitive damages. The court was considering Greene's argument that the punitive damage had been improperly based on his conduct during pretrial discovery. The court said: "I think you are off the mark. I don't think this jury did anything regarding what happened in discovery other than taking the fact that Mr. Greene lied from day one through the discovery process -- day one when he met the Howards, through the discovery process and right here on the stand. [¶] Other -- I mean, what else is there? I mean, that -- they considered -- they were looking at him. They were looking at it for its impeachment value. They were looking at it for his credibility. They weren't looking at the fact that 'Oh, he lied during discovery and all of the shenanigan$ that go on during discovery, which are

(and, as we note below, apparently by the jury as well).

The trial lasted for nearly three weeks. On March 22, 1999, the jury returned a series of special verdicts. The jury found against Greene on his complaint for breach of contract and in favor of Imagine on *its* breach of contract claim (and awarded $3,282 in damages) (Special Verdict 1). Additionally, it found in favor of Imagine as follows: Greene wrongfully withheld the $50,000 security deposit (Special Verdict 2); Greene breached the implied warranty of habitability ($28,000 in damages awarded) (Special Verdict 3); the Howards were constructively evicted ($21,000 in damages awarded) (Special Verdict 4); Greene knowingly concealed a material fact with the intent to deceive ($2,034 in damages awarded) (Special Verdict 6); and Greene knowingly made material misrepresentations (no damages awarded) (Special Verdict 7). The jury further found that Greene acted with oppression, fraud, and/or malice as to the fraudulent concealment (Special Verdict 6).[11]

After receiving further evidence with respect to Greene's net worth ($9.9 million), the jury awarded punitive damages in the sum of $500,000. The trial court rejected Greene's claim that this was excessive because the total compensatory damages awarded for the intentional concealment (Special Verdict 6) was only $2,034. The trial court held that the jury could properly consider the entire $104,816 it had awarded to Imagine as compensatory damages and could determine punitive damages based on that number. The trial court then

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for the most part, at least from what I've seen recently, pretty disgusting. That's not what they were looking at. They were looking at Jeff Greene."

[11]As the jury found that Greene had made intentional false representations and non-disclosures, it obviously did not find that he had made a negligent misrepresentation (Special Verdict 5).

determined that Imagine was entitled pre-judgment interest ($8,608.07) and attorney's fees ($300,000), Judgment was entered in favor of Imagine on April 19, 1999 in the total sum of $613,427.07.

Greene's motion for a new trial and judgment notwithstanding the verdict were denied and he filed this timely appeal.

CONTENTIONS OF THE PARTIES

The primary thrust of Greene's arguments on appeal is that there was not sufficient evidence to support the trial court's determination that the leased premises ever became uninhabitable or that Imagine and the Howards were ever constructively evicted. In addition, he argues that the fraudulent concealment cause of action was never pled but the trial court instructed the jury on the claim anyway. This caused him particular prejudice since the $500,000 award of punitive damages is based on the jury's finding of liability under this claim. Finally, Greene contends that the awards for punitive damages and attorney's fees are excessive.

Imagine disputes each of these contentions and argues that the judgment should be affirmed as entered.

DISCUSSION

Imagine recovered a judgment based upon claims of uninhabitability and constructive eviction. Greene's attack on the judgment asserts that (1) there was no substantial evidence to support either claim, (2) the trial court erred in its rulings on the admission and exclusion of certain evidence, and (3) the jury was improperly instructed. These claims require us to examine the record to determine if substantial evidence exists to support the jury's verdict and whether, as a matter of law, the trial court's evidentiary rulings and instructions to the jury

were correct.

The latter two matters are examined under either the abuse of discretion (evidentiary rulings are reviewed under an abuse standard [*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516] and will result in reversal only if prejudice is shown [*Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147]) or de novo standards. The claim of evidentiary insufficiency is governed by the substantial evidence standard. Under that standard, our task begins and ends with the determination as to whether, on the entire record, there is any substantial evidence whether contradicted or uncontradicted which will support the judgment. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 872-873.) If such substantial evidence is present then we may not substitute our own deductions from the evidence, but must affirm. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 778-779; *Bowers v; Bernards, supra,* 150 Cal.App.3d at p. 874.) In our examination of the record, we view the evidence in the light most favorable to the prevailing party and indulge in all legitimate and reasonable inferences in order to uphold the jury's verdict. (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907.)

1. *The Leased Premises Became Uninhabitable*

Civil Code section 1941 provides that a lessor of "a building intended for the occupation of human beings" is required to put such building into "a condition fit for such occupation, and repair all subsequent dilapidations thereof which render it untenantable,... ."

A dwelling shall be deemed untenantable for purposes of section 1941 "if it substantially lacks any of the following affirmative standard characteristics (relevant to the case before us):

"(a) Effective *waterproofing and weather protection of roof and exterior walls*, including unbroken windows and doors. [¶] ... [¶] (f) Building, grounds and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, *rodents and vermin*, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, *rodents, and vermin*." (Italics added.)

In California, there is a warranty of habitability which is implied in all residential rental agreements. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 629, 637-638.) This warranty "recognizes 'the realities of the modern urban landlord-tenant relationship' and imposes upon the landlord the obligation to maintain leased dwellings in a habitable condition throughout the term of the lease. [Citation.]" (*Peterson v. Superior Court (Paribas)* (1995) 10 Cal.4th 1185, 1204.) The warranty is, in effect, a corollary to the residential landlord's statutory obligation under Civil Code section 1941 to put the premises into a "condition fit for [residential] occupation, and repair all subsequent dilapidations thereof, which render [the premises] untenantable." The standards of *untenantability* set out in Civil Code section 1941.1 provide useful guidelines that are helpful "in determining whether a landlord has satisfied the common law warranty of habitability." (*Green v. Superior Court, supra*, 10 Cal.3d at p. 638, fn. 23.)

While a number of cases have found a breach of the implied warranty of habitability based upon the existence of multiple defects and serious blight (see *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 50 [cracked walls, peeling paint, water leaks, heating and electrical fixture problems, broken windows, rodents, cockroaches and inadequate heat]; *Green v. Superior Court, supra*, 10 Cal.3d at p. 621 [collapsed bathroom ceiling, presence of rats, mice and cockroaches, lack of heat, plumbing blockages, exposed and faulty wiring and illegally installed and

dangerous stove], we see no reason why a single pervasive problem (such as water intrusion or uncontrolled pest infestation) would not be sufficient to establish that a dwelling was untenantable (Civ. Code, § 1941.1, subds. (a) and (f)) and thereby establish a breach of the implied warranty of habitability. (*Quevedo v. Braga* (1977) 72 Cal.App.3d Supp. 1, 7, *disapproved on another point in Knight v. Hallsthammar*, supra, 29 Cal.3d 46 [requisite element of cause of action for breach of the implied warranty is "existence of a materially defective condition affecting habitability" italics added]; *cf. Buckner v. Azulai* (1967) 251 Cal.App.2d Supp. 1013, 1014-1015 [upholding constructive eviction caused by psocid (lice) infestation on basis of Civ. Code, § 1941 and need for minimal "habitability" standard]; *Groh v. Kover's Bull Pen, Inc.* (1963) 221 Cal.App.2d 611, 613-614 [upholding constructive eviction caused by extensive rain water leaks; cited with approval in *Green* as foreshadowing Supreme Court's holding that tenant's duty to pay rent is mutually dependent on landlord's fulfillment of the implied warrant of habitability (*Green v. Superior Court, supra*, 10 Cal.3d at 635, fn. 21)].)

The *Green* court expressly rejected the then prevailing "independent covenant" rule and held that the tenant's obligation to pay rent was "*dependent*" upon the landlord's obligation to maintain the premises in a "habitable" condition. Thus, a breach of the implied warranty of habitability by the landlord would justify the tenant's refusal to pay rent and could be asserted as a defense in any unlawful detainer action. (*Green v. Superior Court, supra*, 10 Cal.3d at pp. 635-637; *Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1174.)

In order to establish that Greene had breached the implied warranty, Imagine had to establish that (1) a material defective condition existed which affected the habitability of the premises, (2) Greene had notice of the condition and (3) he had a reasonable period of time to make the necessary repairs. There is substantial evidence in the record before us to

establish all three of these elements. Based on the testimony of the Howards, and the several witnesses who corroborated their testimony, the jury could reasonably conclude that the leased premises did not provide adequate shelter from the rain. There was repeated testimony that, in January and February 1998 (during the six-week period when the Howards lived in the premises), water leaked from the ceilings, streamed down the walls, filled buckets and bowls put down, flooded floors and saturated carpet and furniture. Mrs. Howard and one of her daughters both slipped on wet floors. The jury was finally justified in concluding that such repeated and extensive water intrusion went well beyond annoyance and inconvenience and represented a threat to the health and safety of the occupants and affected the habitability of the dwelling. There was also evidence of a serious rodent and pest problem. Thus, at least two of the statutory criteria of untenantability were supported by substantial evidence. (Civ. Code, § 1941.1, subds. (a) and (f).)

If this record demonstrates anything it clearly establishes that Greene had more than adequate notice of these conditions and therefore a full opportunity to correct them. Indeed, the evidence is overwhelming that Greene knew of these problems for nearly two years *before* he entered into the lease with Imagine and, despite direct inquiry by agents for Imagine, intentionally concealed the actual facts. Such established *prior knowledge* substantially relaxes the tenant's need to prove that the landlord had a reasonable time to make the necessary repairs. (See *Knight v. Hallsthammar*, *supra*, 29 Cal.3d at pp. 54-55.)

Greene seeks to avoid the inevitable and reasonable conclusion which flows from such a record by arguing that the trial court erred by admitting photographs taken of the premises by Imagine's agents two days after the Howards had moved out but denying admission of a video taken by Greene several days after that (and after his clean-up crew had gone

through the house). Greene also objects to the receipt of testimony from Robert Holmes (one of the authors of the Boatwright/Holmes report prepared in March of 1996) but the exclusion of testimony by his expert who first saw the house at the same time Greene took his video (and after the house had been cleaned up). We reject both of these evidentiary arguments.

As the photographs presented by Imagine pictured what the Howards had to put up with, they were relevant and admissible. When they were taken it was again raining heavily and while some of the leaks may have been "new," the testimony demonstrated that many were not. The photographs, according to the testimony, accurately reflected the serious water intrusion problem which had caused the Howards to move. Greene's video, on the other hand, taken several days later while the sun was shining and after a maintenance and repair crew had gone through the house reflected just the opposite. It was within the trial judge's discretion to exclude the video. (Evid. Code, § 352.)

With respect to the testimony of Robert Holmes we reach a similar conclusion. He had inspected the home nearly two years earlier and concluded *then*, in a written report provided to Greene, that the house was a "leaker." His testimony was relevant and admissible not only as to the prior existing condition of the house, but also as to Greene's prior (and concealed) knowledge of that condition. Greene's witness, on the other hand, could not testify as either a percipient witness or as an expert witness. Testimony of his observations of the house on the date the video was taken were excludable for the same reason as the video. His testimony as an expert was properly excluded as there was no proper foundation for such testimony. He had no knowledge of the condition of the premises on the date the Howards moved out. Thus again, the trial court did not abuse its discretion in rejecting this testimony. (See *Smith v. ACandS, Inc.* (1994) 31 Cal.App.4th

77, 92-93 [expert's testimony excluded without proper foundation]; *Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136 [expert "opinion" based on unsupported assumptions, speculation or conjecture has no evidentiary value].)

Finally, we find no error in the instructions given the jury on this issue.[12] These instructions accurately reflect the

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[12]The jury was instructed as follows on the issue of the breach of the implied warranty of habitability:

"A landlord is liable for any damages for breach of the warranty of habitability where the following are found: [¶] (1) A material defective condition affecting habitability of the premises [¶] (2) Notice to the landlord within a reasonable time of the tenant's discovery of the substandard condition [¶] (3) The defective condition was unknown to the tenant at the time of occupancy [¶] (4) The effect of the condition on habitability was not apparent [¶] (5) The landlord was given reasonable time to correct the defect while the tenant was still in possession. (*Special Instruction No. 3*) [¶] A landlord has a duty to maintain a property in a habitable or tenantable condition. A property is not tenantable if it substantially lacks any of the following: [¶] (a) Weather Protection: Effective weatherproofing and weather protection of the roof and exterior walls, including unbroken windows and doors; [¶] (b) Clean and Sanitary Premises: Building and grounds and appurtenances that, at inception of and during the rental period, are clean, sanitary and free from all accumulation of debris, filth, garbage, rodents and vermin. (*Special Instruction No. 4*) [¶] For purposes of a claim for breach of the implied warranty of habitability, a landlord is required to provide a tenant with habitable living quarters for the duration of the lease. 'Habitability' does not mean that a landlord ensures that leased premises are in perfect, aesthetically pleasing condition, but it does mean that bare living requirements must be maintained. [¶] Where the landlord fails to provide a tenant with habitable living quarters, the tenant is still required to pay rent based upon the reasonable value of the premises, if any. (*Unnurnbered Special Instruction*) [¶] A landlord has a duty to inspect a rental dwelling and correct any defects disclosed by inspection that would render the dwelling uninhabitable. (*Unnumbered Special Instruction*)"

law and, in any event, if there was any error we see no basis for finding prejudice to Greene under any of the factors identified by the Supreme Court in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [e.g., the extent and quality of the evidence presented, counsel's arguments, the effect of other instructions and any indication of jury confusion].) As we have already discussed, the evidence was more than sufficient, counsel fully argued their differing interpretations of the evidence (indeed, Greene's arguments on appeal are largely jury arguments), the instructions, *when read together*, provided the jury with an ample statement of the applicable law and there is nothing in the record to suggest that the jury was confused. Thus, no basis exists for concluding that, even if the jury instructions were not entirely adequate, that Greene sustained any prejudice thereby.

2. *The Record Supports The Jury 's Finding Of Constructive Eviction*

The term "constructive eviction" refers to the common law rule which allows a tenant aggrieved by certain conduct of the landlord to terminate the tenancy, thereby extinguishing all of the tenant's obligations under the rental agreement. "A constructive eviction occurs when the acts or omissions ... of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion thereof, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises." (*Groh v. Kover's Bull Pen, Inc., supra*, 221 Cal.App.2d at p. 614.) Abandonment of premises by the tenant within a reasonable time after the wrongful act of the landlord is essential to enable the tenant to claim a constructive eviction. Failure to repair and keep the premises in a condition suitable for the purposes for which they were leased has been held to constitute eviction.

In the residential context, constructive eviction is typically tied, as it is in this case, to a breach of the implied warranty of habitability. Put another way, when a landlord fails to maintain and repair the premises so as to result in their becoming untenantable and unsuitable for the purposes for which they were leased, the tenant has thereby been denied the beneficial enjoyment thereof and a constructive eviction has occurred. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 925-926.) To exercise his or her right to claim a constructive eviction, a tenant must vacate the leased premises within a reasonable time after the landlord's wrongful conduct. (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 847-848.)

As we have already discussed, there was substantial evidence of Greene's breach of the implied covenant of habitability. Such evidence also established Imagine's claim for constructive eviction as it is undisputed that the Howards promptly vacated the premises in response to the conditions which created such uninhabitability. We therefore reject Greene's contention that a constructive eviction was not established by sufficient evidence.

The jury was also properly instructed on this claim.[13]

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[13]The jury was instructed on constructive eviction as follows:

"A tenant is constructively evicted if any one of the following occurs: [¶] The acts or omissions of a landlord render the premises or a substantial portion thereof unfit for the purposes for which they [are] leased; [¶] The acts or omissions of the landlord has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises. [¶] Where an aggrieved tenant vacates the property within a reasonable time, the tenancy is terminated and the tenants' obligations under the rental agreement are thereby extinguished. The tenant is not required to give the landlord prior notice or an opportunity to cure."

Greene argues that these instructions should have been modified to provide that Greene was entitled to prior "notice" of the problems and the term "beneficial use" should have been defined. We disagree.

Greene's claim to prior notice before a constructive eviction can exist was based upon the case of *Hinson v . Delis* (1972) 26 Cal.App.3d 62, where the court imposed a prior notice and reasonable time to make repairs requirement upon a claim for breach of the implied covenant of habitability. (*Id.* at pp. 69-70.) However, this rule was overturned by the Supreme Court's decision in *Knight v. Hallsthammar, supra*, 29 Cal.3d at pp. 54-55. fn. 7. "[A] landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Id.* at p. 55.)

The implied warranty of habitability provides to the tenant a reasonable expectation that the landlord had already inspected the property and made any necessary repairs so as to correct any defects which might make the premises uninhabitable and will promptly repair any subsequent defects of which the landlord has actual or constructive notice. (*Peterson v. Superior Court (Paribas), supra*, 10 Cal.4th at pp. 1205-1206.) Given this state of the law with respect to the implied warranty, there could be no rational basis for imposing a notice requirement for constructive eviction. Finally, as we have already emphasized, Greene in fact had ample notice of the defects so he was not prejudiced by the absence of this requirement in the jury instructions, even if it were the law.

Greene's contention that "beneficial use" needed a more precise definition is summarily rejected. In the context of the facts presented here, the jury needed no further explanation of the term and it certainly did not express any confusion.

3. *There Was A Valid Basis For The Fraudulent Concealment Claim*

Greene does not argue that the jury was presented with insufficient evidence to support its determination that he had engaged in acts amounting to fraudulent concealment. Rather, he claims that this was a claim which had never been pled by Imagine and thus there was a fatal material variance between pleading and proof. After carefully examining this record, we have concluded there is no merit to that argument.

Imagine's fourth cause of action was for fraud and intentional misrepresentation. In that count, it was alleged that Greene had made a number of representations regarding the condition of the leased premises including such material misrepresentations that all leaks had been repaired and the house had not sustained any water infiltration during the proceeding two and one-half years. Given what was proven at trial, it is obvious that these allegations, liberally construed, embraced the claim that Greene knew of and failed to disclose numerous problems with the house. The trial court certainly reached that conclusion.

The record reflects that there was substantial discovery on the issue of Greene's failure to make proper disclosures. Thus, Greene knew long before trial that this would be an issue. Nonetheless; just prior to trial he objected that no cause of action for fraudulent concealment had been pled. In addition, it will be recalled that it was just before trial that Imagine had, through its own investigative efforts, uncovered the Boatwright/Holmes report and obtained the very important testimony of one of the authors of that report, Robert Holmes. As a result, Imagine, just prior to the commencement of jury voir dire, indicated to the court that it would move to amend its complaint to add a specific cause of action for fraudulent concealment if that would resolve Greene's objection. The court said it was not necessary. The existing pleadings were

broad enough to encompass the concealment claim urged by Imagine; no formal amendment would be required. This ruling was patently correct.

While it is true that a plaintiff cannot recover on a cause of action not pled (*Walker v. Belvedere* (1993) 16 Cal.App.4th 1663, 1670), a claim which falls with a liberal reading of the allegations may be pursued. "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) More significantly, given Green's full knowledge of, and active participation in discovery concerning his failure to make adequate and proper disclosures, he is in no position to claim prejudice or surprise. "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits ... ." (Code Civ. Proc., § 469.) Greene makes no credible claim to having been misled in any way. As we have already discussed, the late discovery of evidence by Imagine cannot have come as a *legitimate* surprise to Greene because it was his false answers to Imagine's formal discovery requests which caused Imagine to be so delayed in its collection of relevant evidence.

Given that Imagine pled a fraud cause of action and that Greene was on notice of the nondisclosure claim throughout the litigation and not hampered in any way in his defense, the trial court acted well within its discretion in concluding that any variance between Imagine's pleading and proof was immaterial. The trial court likewise acted well within its discretion in sending the issue of fraudulent concealment to the jury. (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1572 [failure to plead conspiracy immaterial where defendant understood theory of plaintiffs case]; cf. *Godfrey v. Steinpress* (1982) 128 Cal.App.3d 154, 174 [where plaintiff stated a fraud claim in complaint and trial court granted oral

motion to amend to state fraudulent concealment claim, jury was instructed on concealment, and parties argued concealment to jury, it was immaterial that plaintiff never actually filed a written amendment].)

In response to Special Verdict 6 the jury found that Greene had fraudulently concealed material information from Imagine which resulted in damage to Imagine. Greene claims that the jury based that conclusion solely on the evidence that he had, during the discovery phase of the case, failed to produce the Boatwright/Holmes Report and had falsely claimed that no such report existed. Given that the record provides ample evidence of Greene's intentional and fraudulent non-disclosure we must conclude that Greene's contention is nothing more than a baseless speculation.

The evidence of Greene's pre-trial misconduct was focused upon a more general issue. It was admissible on his credibility as a witness. (*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11-12; BAJI2.03; BAJI2.20; BAJI2.22.) Greene does not dispute this. Moreover, this distinction was made clear in the argument of both counsel and in the court's rulings and instructions limiting the scope of such evidence. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1163.) We need say no more.

4. *The Jury 's Award of Punitive Damages Was Not Excessive*

"Under settled principles '. .. our review of punitive damage awards rendered at the trial level is guided by the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice. .. ." [Citation.]' [Citation.] ... [T]he purpose and function of punitive damages is to punish wrongdoing and thereby protect the public from future

misconduct, either by the same defendant or by other potential wrongdoers. [Citations.] In determining whether an award is excessive the courts apply three criteria grounds in that purpose and function: (1) the particular nature of the defendant's acts in light of the whole record, (2) the amount of compensatory damages awarded, and (3) the wealth of the defendant. [Citation.] The key question is whether the amount of damages awarded exceeds the level necessary to properly punish and deter. [Citation.] Thus, '. .. the function of deterrence ... will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. [Citations.] By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter.' [Citation.]" (*Weeks v. Baker & McKenzie, supra,* 63 Cal.App.4th at p. 1166.) It is also true that punitive damages should bear a reasonable relationship to actual damages suffered. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 390.) However, there is no fixed ratio by which to determine the reasonableness of that relationship. (*Ibid.*) We are satisfied that it is only necessary that such reasonableness be decided in the context of the facts of the particular case.

Greene's primary attack on the jury's award of $500,000 in punitive damages rests upon the proposition that the jury found a basis for such damages only with respect to the fraudulent concealment claim (Special Verdict 6). When the jury found that Greene's conduct resulted in a constructive eviction it also concluded that Greene's conduct, on which that finding was based, did *not* involve fraud, malice or oppression (Special Verdict 4). Similarly, the jury found that Greene had knowingly made false representations as to material facts with the intent to defraud Imagine, but "deadlocked" on whether in doing so Greene had acted with fraud, malice or oppression (Special Verdict 7).

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Thus, it was only as to the fraudulent concealment claim (Special Verdict 6) that the statutory predicates to an award of punitive damages (Civ. Code, §§ 3294, subds. (a) and (c)) were found by the jury to exist by "clear and convincing" evidence. Moreover, as Greene emphasizes, the jury only awarded $2,034 in *compensatory* damages for the fraudulent concealment claim. He argues, given such a low compensatory award, an award of punitive damages which is more than 245 times that amount is excessive as a matter of law. Imagine does not vigorously quarrel with that conclusion, but rather argues that it is based upon a faulty premise. Imagine contends that the relevant "compensatory" award, by which the reasonableness of the punitive award should be measured, is the total compensatory damages awarded by the jury on all claims. The trial court agreed with this argument and so do we.

While the record is not as clear on this point as one would expect,[14] it appears that the damages which Imagine was awarded by the jury were as follows: (1) $3,282 in damages due for Greene's breach of contract (Special Verdict 1); (2) $50,000 as the security deposit paid under the lease which it was entitled to have refunded (Special Verdict 2); (3) $28,500 in damages for the breach of the implied warranty of habitability (Special Verdict 3); (4) $21,000 in damages for the constructive eviction (Special Verdict 4); and (5) $2,034 in damages for Greene's fraudulent concealment (Special Verdict

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[14]The record is very confusing as to just what damage evidence was presented to the jury. It appears that Imagine claimed (1) a refund of rentals paid, (2) a return of the $50,000 security deposit, (3) the costs they incurred to make repairs for which Greene had promised to pay, and (4) the costs of moving to new living quarters and the excess rent which they were required to pay as a result of the need to quickly acquire new housing. It is also apparent that the jury did not award to Imagine all of the damages that it had claimed.

6).[15] The total of these damages was $104,816. Neither the record nor the briefs provide any precise explanation as to how these damages were calculated; nor is there any discussion by the parties as to just what evidence supports these specific amounts. We can only assume, as apparently did the trial court, that the total compensatory damages claimed by Imagine was $104,816 and the jury simply apportioned these damages among the several special verdicts until it ran out of dollars. This is, at least, a reasonable explanation for the award of such a small amount for Greene's fraudulent concealment ($2,034) and the award of nothing ($0) for his intentional misrepresentations, both of which claims the jury found to be true.

The trial court concluded that the jury, in making its award of punitive damages was entitled to consider all of the damages proven by Imagine, not just the "remainder" amount inserted by the jury in the special verdict relating to fraudulent concealment. We agree with Imagine that the analysis of the court in *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, fully applies in this matter.[16] In that case, as here, a series of special verdicts was submitted to the jury. The forms relating to fraud were last in the series. After awarding over $65,000 on contract claims, the jury awarded $1,625 on a fraudulent concealment claim. The jury then answered "no further damages" in the damage line on the special verdict

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[15]As already noted, the jury found that there had been no *negligent* misrepresentation (Special Verdict 5) and awarded zero damages for the intentional misrepresentation (Special Verdict 7).

[16]Arguably, the $50,000 security deposit is not an item of damage resulting from Greene's misconduct; this amount was due to the Howards at the end of the lease as a matter of contract. While this may be true, it does not affect our analysis as to the reasonableness of the punitive damages when *all* of the circumstances are taken into account. Therefore, we will not consider that issue further.

relating to intentional fraud. When the defendants argued that punitive damages could not be awarded where the plaintiff had not suffered actual injury, the court concluded that the jury's findings, read as a whole, supported the conclusion that the jury had found that plaintiff had suffered actual injury, but that "the full actual damages suffered had been awarded under earlier issues found to be true." (*Id.* at p. 1223.) The jury, by its allocations and reference to "no further damages," was recognizing that fact and simply attempting to avoid a double recovery. (*Ibid.*) The All-West court found this appropriate. We reach the same result here.

This record clearly demonstrates that Greene's fraudulent conduct led to Imagine's execution of the lease, the move-in on January 5, 1998 by the Howards, the payment of rental and a security deposit and the ultimate move-out in early February. Thus, the "actual injury" suffered by Imagine, for purposes of measuring the reasonableness of the punitive award, is properly reflected in the *total* damages found by the jury and that their allocation among the several claims is not significant. "A verdict should be interpreted so as to uphold it and to give it the effect intended by the jury, as well as one consistent with the law and the evidence." (*All-West Design, Inc. v. Boozer, supra,* 183 Cal.App.3d at p. 1223, quoting from 7 Witkin, Gal. Procedure (3d ed. 1985) Trial, § 343, p. 343.) Greene cites no relevant authority compelling a contrary conclusion. Whatever the merits of the argument that the reasonable relationship (to actual damages) rule not be rigidly applied (see, e.g., *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1098), we have no trouble concluding that the approximate 5:1 (or even 10:1) ratio involved here, when all of the circumstances and Imagine's *total* actual damages are considered, is entirely appropriate.

Greene's other argument, which he makes to support his contention that $500,000 is an excessive award, is equally

without merit. He contends that it improperly exceeds that amount necessary to punish and deter. We disagree. The evidence presented by Imagine reflected that Greene had a net worth of $9.9 million. The aware represented approximately 5% of that amount. Given Green's wrongful conduct as established by the record in this matter, his wealth and the extent of actual damages sustained by Imagine we cannot conclude that the jury made an award which was the result of passion or prejudice or unsupported by the evidence.

5. *Attorney 's Fees Were Properly Awarded*

The lease executed between Greene and Imagine contained a very broad attorney's fee clause. "In any action or proceeding *arising out of this agreement*, the prevailing party shall be entitled to reasonable attorney's fees and costs." (Italics added.) Imagine was the prevailing party and clearly is entitled to an award of fees even though some of the claims are based upon tort rather than contract. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608; *Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1344.)

"[T]he trial court has broad authority to determine the amount of a reasonable fee." (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) In exercising its discretion, the trial court should consider the nature of the litigation and its difficulty, the amount of money involved, the skill required and employed in handling the litigation, and the time spent (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 40, fn. 8; *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, 1490.) The trial court's weighing of these factors commands substantial deference on appeal. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at p. 1095 ["The 'experienced trial judge is the best judge of the value of the professional services rendered in Cher] court, and while [her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' "]; *Mustachio v. Great*

Western Bank (1996) 48 Cal.App.4th 1145, 1151 [appellant must show that the trial court "exceeded the bounds of reason or contravened uncontradicted evidence"].)

Greene argues that except for the fame and fortune of Ron Howard there was nothing unusual about this case; it was nothing more than a "garden variety breach of lease case." Attorney's fees in the Sum of $300,000 as awarded by the court was unreasonable as a matter of law and should be reduced "to between $60,000 and $90,000."

We agree with the argument of Imagine's counsel who asserts that this case was far from a simple breach of lease case; and it was made more difficult, complex and expensive by Greene's own actions. This record reflects that he stonewalled on discovery requests, necessitating hours of meet and confer conferences and correspondence, and follow up discovery requests. When he finally did respond, he swore under penalty of perjury that he had no knowledge of or documents relating to prior tenant complaints. This, of course, was not true. Imagine discovered the actual facts when, in the course of retaining an expert, it happened to contact Robert Holmes. Holmes' revelations about the prior water intrusion problems precipitated more investigation, ultimately leading to the attorney for the prior tenant who confirmed that Greene was fully aware of the Boatwright/Holmes Report and reoccurring water intrusion while the prior tenant had occupied the house. The trial court (outside the presence of the jury) minced no words with respect to Greene's conduct: Greene's discovery responses "so obfuscated and really, candidly disgusting;" warning Greene that his conduct was so out of line that "I am not convinced that I may not sanction you for perjury and for contempt of court"; Greene lied "through the discovery process and right here on the stand." In short, Greene's own conduct substantially complicated the litigation. He is in no position to complain about the time counsel for

Imagine was required to spend on the case.[17]

Furthermore, the trial court did not award Imagine all of the fees it had requested. Imagine sought $347,000 in fees; the trial court awarded $300,000. This reduction addresses any legitimate claim that the trial court failed to carefully consider Greene's objections as to the amount of the fees. (See, e.g., *Mustachio v. Great Western Bank, supra*, 48 Cal.App.4th at p. 1151 [in affirming fee award, appellate court notes that trial court awarded less than was requested]; *Montgomery v. Bio-Med Specialties, Inc.* (1986) 183 Cal.App.3d 1292, 1296-1298 [no abuse of discretion where trial court reduced requested fees after considering extensive documentation of hours spent and services performed].) We are satisfied that the trial court did not abuse its discretion in awarding attorney's fees in the sum of $300,000 to Imagine.[18]

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[17]It appears Greene does not quarrel with the rates charged by Imagine's counsel or assert that lack of counsel qualifications and experience resulted in excessive charges.

[18]When it is remembered that Greene rejected an opportunity to resolve this matter in February 1998 by simply refunding the security deposit and the pro-rated unearned rent for that month, it is very difficult to credit his claim as to excessive fees. This entire dispute and the exhaustive and expensive litigation which followed is entirely his doing.

DISPOSITION

The judgment is affirmed. Imagine shall recover its costs on appeal.[19]

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, Acting P.J.

We Concur:

KITCHING, J.

ALDRICH, J.

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[19]If Imagine seeks to recover its attorney fees incurred on appeal (pursuant to the attorney's fee clause in the lease) that matter should be resolved by the trial court upon proper motion following remand.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 3

May 15, 2001

Jeff Greene
v.
Imagine Entertainment

B133119
Los Angeles County No. BC189133

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

Court of Appeal, Second Appellate District,
Division Three - No. B133119

S098068

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED

JUL 11 2001

Frederick K. Ohlrich Clerk

DEPUTY

JEFF GREENE, Plaintiff and Appellant,

v.

IMAGINE ENTERTAINMENT, Defendant and Respondent.

Petition for review DENIED.
Werdegar J., was absent and did not participate.

GEORGE

Chief Justice